No. 8306.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO.),

Claimant and Appellant,

THE JAPANESE MOTORSHIP "KOYEI MARU", her motors, tackle, apparel and furniture,

Respondent,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Libelant and Appellee.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO., LTD.),

Libelant and Appellant,

vs.

THE AMERICAN TUG "DAVID P. FLEMING", her motors, tackle, apparel and furniture, etc., and THE SCOWS P. S. B. & D. CO. NO. 13, PIONEER NO. 11 and W. T. CO. NO. 14,

Respondents,

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Claimant and Appellee.

PACIFIC VEGETABLE OIL CO., INC., a corporation, and five others, owners and consignees of cargo laden on board the Japanese Motorship "KOYEI MARU",

Libelants and Appellants,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Respondent and Appellee.

REPLY BRIEF FOR APPELLANT, TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO., LTD.).

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I.

STATEMENT OF THE CASE.

As counsel for appellee point out, there is relatively little difference remaining for discussion with respect to the statement of the facts. We have, however, a few observa-

tions to make upon the points mentioned in appellee's brief.

We do not suggest that the evidence is undisputed that Pilot Jorgensen asked to be relieved at 1:55 A. M. when the vessel was opposite No. 2 buoy but we do contend that the rapid softening of this witness' testimony on cross-examination from the flat assertion that the captain dismissed him to the statement that he was only "pretty sure" that he did not himself ask to be relieved is rather significant and tends to strongly support Captain Watanabe's version of the occurrence.

Whether the DAVID P. FLEMING crossed the "main channel" or not (and we are not entirely clear what counsel call the "main channel") she certainly did cross the entrance to the harbor and proceed unnecessarily close to the breakwater light with a tow of most extraordinary length.

There may well be some slight variations in the time when the lights on the second and third scows were definitely recognizable by the different officers of the KOYEI MARU as running lights. Captain Watanabe ordered the anchor dropped as soon as they appeared green to him. That time was fixed at 2:08 A. M. Takahashi testified that he could not see these lights at all at 2:04 A. M., and even at 2:06 they appeared without color [Ap. p. 436] and that it was not until some time after 2:06 or ". . . might be 2:07" that they appeared green. Obviously, he is not attempting to be exact as to the time. But it is quite unfair to say that this witness testified that he saw the green lights *at* 2:06. Nor is Hata's testimony susceptible of the interpretation that he saw the green lights precisely at 2:06. His evidence, taken as it was necessarily by

written interrogatories in a language foreign to him, is not as full as it might be. It is true that he does testify that when he first became aware of the presence of a tug and tow he saw the green lights on the second and third scows, but he also testified that at or about this time he received an order to drop the port anchor. [Ap. pp. 41, 42.] This order was admittedly given at 2:08. Even if it be the fact that the other officers recognized these lights as green lights a few seconds before Captain Watanabe did so, the validity of the KOYEI MARU'S contentions is not affected. If these lights had been what they should have been they would have been clearly observable as green lights long before 2:06.

II.

THE ALLEGED FAULTS OF THE KOYEI MARU.

1. The KOYEI MARU cannot be automatically charged with fault simply because she might be regarded as an overtaking vessel.

We do not rely on the proposition that the KOYEI MARU was not an overtaking vessel. Nor do we concede that the KOYEI MARU was necessarily at fault if she *is* regarded as an overtaking vessel. What we do say is, that the authorities leave the matter in some doubt as to whether this case presents an overtaking or a crossing situation, but even if it be admitted that the tug and tow must be regarded as one vessel, and that the KOYEI MARU being more than two points abaft the beam of the tug, is necessarily an overtaking vessel with respect to the entire flotilla, that fact alone is not enough to charge the KOYEI MARU with fault. As the situation appeared to her, she had no notice that she was confronted with a tug and tow. All

she saw was a blur of light to the right and two dim and colorless lights two and four points to the left, much too far to the left to suggest any connection with the light to the right. She *did* keep out of the way of the craft carrying a blur of light on her starboard hand. It must be remembered that no one on the KOYEI MARU saw any light on the first scow at any time before or after the collision, even when the searchlight was turned directly on it. All of the KOYEI MARU'S witnesses testified to that unequivocally and repeatedly. Hata testified that he looked ahead, particularly at the time the searchlight was turned on the black object, which proved to be the first scow and that no light could be descried. [Ap. p. 42.] Takahashi also positively stated that there were no lights visible on the "dark object" and that at no time, either before or after the collision, could he see any lights on the scow. [Ap. pp. 437-440.] Honda, second mate, never saw any lights on the first scow before or after the collision, and he only knew that it was a scow when the searchlight was turned on it from the tug boat. [Ap. p. 555.] Captain Watanabe, of course, also testified that he did not see any lights on the first scow either before or after the collision. [Ap. p. 346.] During all of this time the first scow was closer to the KOYEI MARU than were the second and third scows on which lights *were* observed. The conclusion is simply irresistible that if the first scow had a green running light, it was for some reason obscured, or so dim as to be utterly useless.

2. As we stated in our opening brief, the charge that the KOYEI MARU was at fault in not stopping at 2:04 depends largely on the same considerations that apply with respect to the argument that she was an overtaking vessel, and hence bound to keep out of the way. If the light on

the first scow had been seen, the KOYEI MARU would not have been prudently navigated in proceeding ahead on her course, because, in that event, she would have been running directly for the first scow. As it was, however, there was apparently about 3,000 feet of clear water between the blur on the right and the first faint light discernible to the left. It appeared perfectly safe to proceed directly ahead. Dropping her speed to slow and watching the lights to the right and left respectively broaden as she proceeded ahead, the KOYEI MARU did everything that a vessel could have been expected to do in the situation in which she apparently found herself.

The attempt made by counsel to augment the speed of the KOYEI MARU cannot be substantiated. In the first place, why convert her speed into land miles? The only possible purpose of this would seem to be to make it look faster than if the customary practice of stating the speed of a vessel in nautical miles were followed. The table of distances and speeds set out on page 10 of the brief can hardly be taken as being literally correct, as the points marked on the chart are necessarily approximate positions merely and in these short intervals of time very minor errors would make sharp differences in the calculations. Between 1:55 and 1:56 the KOYEI MARU'S engines were set slow ahead. Between 1:56 and 1:57 they were stopped; from 1:57 to 2:01 they were set slow ahead. From 2:01 to 2:04 they were going at half speed; between 2:04 and 2:06, slow, and from 2:06 to 2:09 they were set full astern, during the last minute of which time the anchor was down. [Ap. p. 530.] It would seem that the estimated average speed of four knots between 1:55 and 2:01 in the table is a little low, as during that period the vessel was proceeding mostly on a slow bell (one minute

with engine stopped), which should give her a speed of a little more than the four knots computed by counsel. [Ap. p. 530.] On the other hand, the calculated speed from 2:01 to 2:04 seems slightly high, as during that period the vessel was traveling with her engines set at half speed, which could hardly give her, starting as she did from slow, a speed in excess of about nine knots. The estimated speed from 2:04 to 2:06 of seven and one-half knots is about correct, as during those two minutes the vessel on a slow bell would gradually reduce speed. The speed from 2:06 to 2:09, of four knots, is a little too high. The point marked on the chart as 2:09 is slightly too far away from the breakwater light as the captain platted the approximate point fixed by the bearing taken after the collision on a chart using points instead of degrees. If the point of the collision is accurately platted from that bearing, it will be discovered that in those three minutes with reversed engines, the vessel did not travel more than about 1050 feet, which would mean an average speed of three knots. Counsel profess difficulty in understanding how the KOYEI MARU could be almost dead in the water when the scow was struck and yet travel 1200 feet in the last three minutes prior to the collision. As we have said, we believe she did not travel quite 1200 feet in those three minutes, but if she did, it is entirely reasonable to assume that she went substantially 600 feet of that distance in the first minute, before she felt the effect of her reversing screw, perhaps 400 feet more in the second minute and 200 feet in the third minute. Her *average* speed in the minute prior to the collision would, on this hypothesis, be only two knots. So far from it being difficult to understand how the vessel traveled 1200 feet in the last three minutes if she was going so slowly at the

moment of impact, on the contrary, it is demonstrable that if she traveled in that time no more than 1200 feet, she would be necessarily almost at a standstill at the time the collision occurred.

We have read the cases cited by counsel for the proposition that a vessel is required to stop on seeing unidentified lights ahead. They do not sustain that unqualified proposition, nor do they impugn the contrary doctrine stated in

> *The Scotia,* 14 Wall. (81 U. S.), 170, 20 L. Ed. 822.

We think it is a justifiable assertion that every case holding a vessel at fault for failing to stop when unidentified lights were seen ahead deals with the situation where a collision ensued with the object bearing the unidentified lights, and are not applicable to a case where there was no apparent risk of collision with the vessel or vessels carrying the lights in question.

3. On the subject of the KOYEI MARU's lookout, we can only reiterate the chief officer's testimony that he was stationed on the forecastle head charged with the duty of keeping a lookout; that he had no other duties and that this was true for a period of about thirty minutes prior to the collision. Counsel cross-examined Captain Watanabe on this subject exhaustively—his questions covering eleven pages of the transcript [Ap. pp. 367-377] and he was altogether unable to elicit from Captain Watanabe any testimony that would tend to show that chief officer Hata was called upon to do anything other than act as lookout for the entire period he was stationed on the forecastle head prior to the collision. It was obviously the practice of the KOYEI MARU for the chief officer to act

as lookout until the vessel was safely out of the harbor. If any emergency arose which might have required the chief officer to have assumed other duties there would have been nothing whatever to prevent Mr. Hata stationing the apprentice, the boatswain or the carpenter as lookouts while such duties were attended to. Nothing of the sort, however, had to be done and the undisputed testimony remains that Hata was on duty as lookout and was solely charged with that duty.

The very most that can be said is that the chief officer would have received orders from the captain if any had been given. The testimony shows affirmatively that no orders were given except the order to drop the anchor a minute before the collision. The assertion that the chief officer was supervising the work is directly contrary to the boatswain's testimony. [Ap. p. 547.] The record therefore is undisputed that the chief officer was devoting his exclusive attention to his duties as lookout.

Nor can any legitimate argument be made that because Captain Watanabe saw the lights on the second and third scows before any one else, the chief officer was in any way inattentive. The lights on those scows could barely be seen at all by Captain Watanabe at 2:04, even with the aid of high-powered glasses. Mr. Hata *did* see the blur of light to the starboard hand as early as any one else. Consequently it cannot be argued that he was in any way inattentive or performing some other duty at that moment. It is not at all unusual for those on the bridge, particularly when dealing with relatively short distances such as we have here, to see a light or other object as early as, or earlier than the lookout in the eyes of the ship.

We do not quarrel with counsel's cases on the subject of lookouts. We do take issue with the claim, as directly contrary to the undisputed evidence, that the KOYEI MARU did not have a proper and efficient lookout.

4. The oral opinion of the court does not state, as counsel infer, that the court found those on the KOYEI MARU negligent in not seeing the lights on the scows. The oral opinion, in effect, holds that the evidence shows that the last two scows were properly lighted; that the first one might not have been but that this didn't make any difference because the KOYEI MARU, seeing the lights on the second and third scows, was at fault in colliding with the second one of them. The court obviously failed to appreciate that the defective or missing light on the first scow resulted in the KOYEI MARU getting closer than she otherwise would have come, and that the misleading range light on the tug conveyed the false information that there was no connection between the lights to port, and the tug and first scow (which the tug's lights falsely said was the only vessel in tow). The court didn't understand that in such a case the craft on the left, whatever they were, were *prima facie* bound to keep out of the KOYEI MARU's way. The court also apparently failed to appreciate the fact that the KOYEI MARU did not run into the scow but that she struck the tow line well ahead of the second scow, after having been misled into the belief that she was safe in passing ahead of the scow with which she ultimately collided.

The trial court, rejecting the offer of both sides to brief the case, and declining to read a single decision, decided the matter on the proposition that as the KOYEI MARU saw a light on the scow with which she collided she was *solely* to blame.

The issue on the question of the KOYEI MARU's fault for failing to identify the lights really resolves itself into the question of whether the lights on the tug and tow were proper. The record leads to the conclusion that they were not—from which it follows that the KOYEI MARU should be exonerated and the tug and tow condemned.

We have not overlooked the testimony as to the blowing of the long series of danger signals by the DAVID P. FLEMING. If these whistles were of the amazing loudness that the FLEMING's witnesses would have us believe, isn't it remarkable that witnesses were not produced by the dozen who had heard this astonishing tattoo? Yet not even the pilot, whose enthusiastic espousal of the FLEMING's case can only reveal his own guilty conscience, dared to testify he heard them. Not one person on the KOYEI MARU heard a single whistle. What the explanation is we do not venture to suggest. But the record as a whole leaves one unconvinced that these whistles *could* have been blown with the frequency, with the loudness, or for the length of time claimed by the tug.

III.

THE FAULTS OF THE DAVID P. FLEMING AND THE TOW.

The application of the well-known major and minor fault doctrine to this case as a basis for exonerating the FLEMING approaches absurdity. That rule is sometimes applied (rather sparingly for it is a rather artificial one) to resolve doubts as to the navigation of one vessel in her favor when there is clear and convincing evidence of fault on the part of the other ship, sufficient *per se* to account for the collision. It is never applied to relieve a vessel from the consequences of an admitted statutory fault.

Such a vessel as we have seen, must take the affirmative burden of showing that her fault not only did not but could not have contributed to the collision.

Now the FLEMING stands guilty on her own testimony of not one statutory violation but *three*. These, in addition to other palpable and serious faults, which have been discussed in the opening briefs, so clearly brought about the collision that it is not, we submit, an overstatement to say that if the major and minor fault doctrine is to be applied at all to this case, it must result in the exoneration of the KOYEI MARU and in the condemnation of the FLEMING.

The faults of the FLEMING and the tows need not be reviewed again in detail. We shall merely reply to some of the excuses offered in appellee's brief, discussing the points in the order in which they are presented by counsel.

1. First, we find the discussion regarding attendants on the scows.

It is suggested that no regulation requires it. There is no statute on the subject, but the cases cited in our opening brief which counsel have failed to distinguish, most emphatically condemn tows of this character for failing to take this reasonable precaution.

It is stated that the scows were small; the answer to that contention is briefly made—they weren't—they were big.

The argument about the danger is demolished by the captain's own admission that there would have been no danger that night to any attendant on the scows. The claim of danger, moreover, is based on the proposition that the scows had no accommodations on them. That is a strange defense. It is apparently the theory that it is

justifiable to economize on the construction of the scows, and then excuse the hazard to other people on the plea that to take the precaution of posting attendants would jeopardize the lookouts because the scows weren't built properly!

If men are not carried on any of the scows engaged in the Catalina rock run, it is high time they were.

Counsel suggest that the cases we cited are nearly all cases involving very long seagoing tows and in most of them the tows were for long distances. We were under the impression that a tow nearly half a nautical mile long (or as counsel seem to prefer it, well over half a statute mile) *is* a very long tow,—we had the notion that this *was* a seagoing tow (counsel seem to think it was when discussing the dangers)—and we were not aware that any different principles applied to a twenty-five mile run from those governing longer runs.

Counsel state that the court in

The America, 102 Fed. 767,

does not consider that the tug itself could also have cut the hawser. Just how anyone on the tug could have cut the hawser between the first and second scow in our case is not apparent.

Appellee gives an itemized list of its virtues in complying with its admitted duty of exercising a high degree of care. It refers to inquiry of the U. S. Steamboat Inspectors to ascertain what lights were required on the scows. Yet it obviously made no inquiry as to the requirements for the tug. It purchased special lights to put on the scows—yet it sent out the tug with lights improper in three respects, and manned her with a man who didn't even know what the rules required.

We cannot agree that negligence has not been established. On the contrary, we contend that the charge of fault on this score remains unanswered.

2. The timely use of the searchlight by Captain Johnson at an earlier time would probably have prevented this collision. True it was not required by any specific rule. It *was* an extraordinary measure. But this was an extraordinary tow and of such extreme inherent hazard that extraordinary precautions were necessary and the failure to take any means at hand which would have lessened that hazard was, in the circumstances, culpable, and a proximate cause of the collision.

3. Largely the same considerations govern the matter of navigating at night with a tow this long so near the entrance of the harbor. In its duty to take every possible precaution with a tow that the trial court itself styled "a menace to navigation," it is not unreasonable to require that appellee conduct this hazardous operation as far away as possible from the harbor entrance, if indeed it was necessary to do it at night at all.

4. We have already alluded to appellee's very emphatic testimony that the lights on the scows were set and burning. We have also pointed out the equally definite testimony of the KOYEI MARU'S officers that no light at any time could be seen on the first scow and that the lights on the second and third scows, while seen by the master as early as 2:04, were dim and colorless, and barely visible even with binoculars.

We have no objection to make to the *type* of light used. The evidence of the experiment with them shows that if properly trimmed, cleaned and adjusted they complied with the rules. It shows nothing else. It certainly shows

nothing with respect to the condition of the lights the night of the collision.

No witness from the FLEMING was in a position to see how the lights looked from a point out to starboard. The conclusion can only be drawn that there was something wrong with all the lights on the scows and something very radically wrong with the green light at least on the first scow. The evidence positively refutes any charge of neglect on the part of the KOYEI MARU'S officers. Their very safety depended on seeing what was to be seen. They were handling their vessel with direct reference to the dim lights on the left and the blur of light to the right. They were using binoculars in an endeavor to make out their identity more clearly. Had the light on the first scow been of the required brilliance it is simply incredible that it would not have been seen. Such testimony cannot be blandly disregarded by simply calling it "negative." It is not even necessary to say it is more convincing than that of the FLEMING—and we submit that it is—as it is quite possible, as we suggested in our opening brief, that the lights may have been seen on the tug and still not be visible to those on the KOYEI MARU. The sides of the chimneys may have been smoked, the lamps may have been obstructed or screened off. Whatever the cause, the fault lies with the FLEMING and the scows and it most certainly was a direct cause of the collision.

5. The strongest point we make, says appellee, is the charge of fault against the FLEMING with respect to her own lights. We are inclined to agree, and we submit the charge has not been answered.

Appellee admits that the lights on the tug violated the International Rules in three particulars. It is first sug-

gested that it is inconvenient to change from the requirements of the Inland Rules to those of the International Rules when a vessel crosses the line. This, of course, is no excuse. As the court remarked in

The Cherokee, 253 Fed. 851:

> "Whether the requirement . . . be onerous or not, it must be observed outside harbor limits; else entering vessels cannot possibly navigate to the harbor limits with safety. I cannot understand how this universal rule of the sea can be for a moment questioned."

Even inconvenience cannot explain a practice of having scows lighted (or attempted to be lighted) in accordance with the International Rules in tow of a tug lighted in accordance (or nearly in accordance) with the Inland Rules. Moreover, the International Rules do not *require* a range light at all, and if it *were* inconvenient to fit the range light with a screen, it couldn't have been inconvenient to put it out. These improper lights on the tug can only be attributed to a wanton disregard or an inexcusable ignorance of the positive requirements of the law.

Counsel admit that custom, if established, would provide no legal excuse for a violation of the statute; hence we need not comment on the obvious fact that Jorgensen's testimony falls far short of proving the alleged custom.

It is conceded, therefore, that the FLEMING can be exonerated only if she can meet the burden of showing that these faults could not have contributed to the collision.

The first argument is that the FLEMING *might* have carried an additional white light for the scows (without rudders or attendants) to steer by! This curious suggestion in effect amounts to the proposition that the

FLEMING is excused from misleading the KOYEI MARU by an improper light because the latter vessel might have been misled by something else which the FLEMING *might* have had but did not! The utter fallacy of this conception need not be elaborated upon. But we challenge even the major premise of this flimsy assertion. The permission given a vessel to carry a small white light for a tow to steer by cannot be applicable to a vessel already carrying a stern light. What possible reason could there be for a white light "to steer by" when the towing vessel already had a fixed stern light under the authority of Article 10 of the International Rules? We quite agree with counsel "that a situation like the present requires some sensible practical consideration."

The balance of the argument on the facts consists of the assertions: (1) That unless the side lights were visible, the KOYEI MARU was not justifiably misled by the two vertical lights, one above the other, and (2) that despite the positive testimony of Captain Watanabe and Honda to the contrary, they could not have seen the green light.

We take issue with both propositions. Side light or no side light, two white lights in a vertical line mean only two things, a tow of but one vessel or a tow not exceeding 600 feet long. A navigator seeing them even without a side light would interpret them to mean those things and only those things. Incidentally, even assuming that Captain Watanabe was not *justified* in being misled, that might result in inculpating the KOYEI MARU, but it would not exonerate the FLEMING as the Japanese vessel *was* misled by the admittedly improper lights.

In the second place, counsel say that the positive testimony of Captain Watanabe and second mate Honda that

they did see a green light on the tug must be simply ignored. The testimony of Honda is said to be manifestly impossible because he saw a green light (he did not say he saw it steadily as counsel suggest) *about* two minutes before the collision at four points to starboard. (In passing, we might ask counsel how four points get to be a right angle.) Counsel infer that Captain Watanabe deliberately fabricates his testimony about seeing the green light momentarily because he knew he could not claim to see it steadily. To show the unwarranted nature of this inference, we point out that the KOYEI MARU's answer to interrogatories stating that this green light was seen momentarily at 2:06 [answer No. 15 (c) Ap. p. 30], was filed July 25, 1934, a month before we even knew from the FLEMING's answers, filed August 25, 1934 [Ap. p. 81], that her range light violated the rules.

We admit that the KOYEI MARU could not have seen the green light if her course was exactly south, if the light was properly screened and if the tug was steadily holding her course. But any one or more of these conditions might not have been true. Her course may have been west of south, the light may not have been accurately screened and she may have been allowed to swing out of her course.

When all is said and done, the fact remains that at 2:06 the KOYEI MARU was falsely told by misleading and improper lights that the FLEMING had but one tow. At the same moment, the first scow was lit up by the tug's searchlight. The KOYEI MARU assumed that this scow was the only scow and shaped her course to go astern of it. It is altogether impossible to argue that the improper light could not have contributed to the collision. It was on the contrary a direct and proximate cause of the collision.

Counsel suggest that "Heaven only knows" what the KOYEI MARU would have done if the tug's range light had complied with the law. That assertion alone fixes liability on the FLEMING. In order to escape, the FLEMING must not only know, but prove to a demonstration that the collision would have resulted even if the tug's lights were in all respects proper. This in the nature of things is impossible, as it cannot be proved beyond a peradventure that Captain Watanabe would not have dropped anchor at 2:06 if he had not been misled.

We have examined all the cases cited by appellee in which various vessels were exonerated despite improper lights. They are all cases wherein the offending vessel was able to prove that its improper lights could not have caused or contributed to the collision. In all of them the character and direction of the vessel could be determined, and the improper lights could not have misled the other ship. In none of them were the improper lights in any way causally connected with the collision. We think they were all correctly decided but none of them are applicable to the present case.

We respectfully contend that there is manifest error in the trial court's decision and that the judgments in favor of appellee must be reversed and the lower court directed to enter judgments in the three cases in favor of appellants.

Respectfully submitted,

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